Supreme Court of the United States

October Term, 1919

No. 224

COLEMAN J. WARD ET AL., *Petitioners,*

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

BRIEF OF PETITIONERS.

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AFFIDAVIT OF SERVICE OF BRIEF.

State of Oklahoma, Oklahoma County—ss.

Geo. P. Glaze, being duly sworn, says that he is one of the attorneys for petitioners in *Coleman J. Ward et al., Petitioners,* v. *The Board of County Commissioners of Love County, Oklahoma, Respondent,* pending in the United States Supreme Court; that on Feb. 13, 1920, he deposited in the United States mail at Oklahoma City, Oklahoma, post office, a copy of the within annexed brief of petitioners, addressed to T. B. Wilkins at Marietta, Oklahoma, postage prepaid, and caused the same to be transmitted by registered mail; that T. B. Wilkins is County Attorney of Love County, Oklahoma, and attorney for respondent in said cause; that Marietta is the county seat of said county and the proper address of said attorney for respondent, and is six hours distance, in time, by mail, from Oklahoma City.

.....

Subscribed and sworn to before me February 13, 1920.

.....

Notary Public of Said County and State.

My commission expires November 25, 1922.

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LAWS AND TREATIES REFERRED TO.

CASES REFERRED TO.

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vs.

The Board of County Commissioners of Love County, Oklahoma, Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF OKLAHOMA.

BRIEF OF PETITIONERS.

ABSTRACT AND STATEMENT.

This proceeding is one to recover from Love County, Oklahoma, money paid it by Choctaw and Chickasaw Indian citizens as taxes which such county levied upon lands allotted to them under and by virtue of their treaty with the United States which is contained in the Act of Congress of June 28, 1898, 30 Statute at L., 495-507, which lands so allotted were by the terms of such treaty exempt from taxation.

The petitioners consist of sixty-seven Choctaw and

Chickasaw Indian citizens joined in one action, who filed their petition for such recovery October 25, 1915, with the Board of County Commissioners of such county demanding a refund to them of the aggregate sum of $10,164.24 and interest. The Board of County Commissioners refused the demand of petitioners and an appeal was taken in the manner provided by the laws of Oklahoma, to the District Court of Love County where the respondent, Love County, filed a demurrer to the petition on the principal ground that the petition did not state facts sufficient to constitute a cause of action and entitle the petitioners to a recovery. The petition consists of sixty-seven causes of action, all of which are substantially the same and the general allegations of the petition which are a part of each and all of the several causes of action are contained on pages 4 to 12 of the record. The demurrer of the respondent, Love County, is shown on pages 203-204 of the record. The District Court overruled the demurrer to the petition and the said county electing to stand upon its demurrer refused to plead further in the cause, whereupon the court rendered judgment in favor of the petitioners as prayed for in the sum of 10,164.24 and interest at 6 percent per annum from November 4, 1915, the journal entry of such proceedings in the District Court is set out on pages 204-205 of the record.

Thereupon such county, after presenting its motion for rehearing, which was by the court overruled, perfected its appeal to the Supreme Court of Oklahoma which court on June 11, 1918, reversed the judgment of the District Court of Love County, such proceedings in the Supreme Court of Oklahoma being set out in the record on pages 210-211.

The syllabus which states the law as determined by the Supreme Court of Oklahoma is shown on page 211 of the record and is as follows:

I.

"In the absence of a statute imposing liability therefor a county is not liable for taxes wrongfully collected by a County Treasurer and by him paid over to the state or a municipal subdivision of the state other than the county against which liability is sought to be imposed."

II.

"Where certain citizens of the Choctaw and Chickasaw Nations paid certain taxes assessed against their respective allotments, which were non-taxable, in order to avoid a threatened sale of their lands and in order to avoid the imposition of penalties thereon for failure to pay said taxes and where at the time of said payment there was pending litigation seeking to enjoin the collection of said taxes, and where at the time said parties were fully informed as to the law which made said taxes illegal and there was no immediate necessity for the payment of said taxes to prevent a seizure of the person or property of said persons, Held: that said payment was voluntary, and in the absence of statutory authority therefor cannot be recovered back."

The opinion of the Supreme Court of Oklahoma is shown in full on pages 212-218 of the record.

The petitioners herein who were defendants in error in the Supreme Court of Oklahoma, within the time allowed by law, filed their petition for a rehearing, which petition is shown on pages 218-223 of the record, such petition for a rehearing was overruled by the said Supreme Court on July 23, 1918, and such judgment of the Supreme Court of Oklahoma which had been theretofore rendered herein on June 11, 1918, before final. The overruling of the petition for rehearing is shown on page 234 of the record.

This cause was removed to this court, from the Oklahoma Supreme Court by writ of certiorari prayed for by these petitioners October 14. 1918, on which date they filed their petition for such writ accompanying the same by a

certified record of all the proceedings in the court below. This court granted the writ on October 31, 1918 (record 235), and on November 9th, following, the clerk of the Supreme Court of Oklahoma returned the writ together with a certified copy of the proceedings in the courts of Oklahoma (record 235-236), which return and writ was filed in this court November 14, 1918.

On January 5, 1920, a motion was filed in this court, together with a brief, challenging the jurisdiction of this court and asking that the writ heretofore allowed and the cause, be dismissed. The grounds of such motion being that there was no Federal question involved and that the judgment of Oklahoma Supreme Court was based upon a matter of general law broad enough to sustain it.

The brief accompanying the motion to dismiss went into the merits of the cause as well as the questions involved in the motion and the answer brief of these petitioners on such motion to dismiss likewise went to the merits to some extent, and as this court has reserved consideration of the motion to dismiss until the cause is submitted upon its merits these petitioners ask the court to read their brief opposing such motion to dismiss in connection with this brief. We will endeavor to refrain from presenting jurisdictional matters in this brief but will be compelled to refer to cases herein which are also presented in our other brief, and beg the indulgence of the court in so doing.

The facts in this case are as set out in the petition shown on pages 4-13 of the record and as the demurrer of the respondent, Love County, filed in the trial court, admitted the allegations of the petition to be true such allegations now become what may be considered as an agreed statement of facts.

The petition filed in the first instance asking for a recovery of the money in question set out that these petitioners were citizens of the Choctaw and Chickasaw tribes of Indians and duly enrolled as such and were allotted the lands set out and described in the petition under and by virtue of the provisions of the treaty between the United States and the Choctaw and Chickasaw Indians contained in the Act of Congress of June 28, 1898, 30 Stat. at L., page 495; that the respondent herein, Love County, is one of the counties of Oklahoma, duly organized and existing under the Constitution and laws of such state; that the lands allotted to the petitioners were all situated and lying within the boundaries of Love County and had before the allotment thereof belonged to the Choctaw and Chickasaw tribes of Indians; that under and by virtue of the said treaty and Act of Congress all of the lands so allotted were exempt from taxation while the title remained in the original allottee, not exceeding twenty-one years from the date of the patent (record, page 5). It was alleged at the period of tax exemption had not yet expired and that the title to said allotments was still retained by the respective Indian citizens who are the petitioners herein; that disregarding the rights of these petitioners and in violation of the terms of the said treaty and Act of Congress and in violation of the express duty imposed by law upon the officers of said county the said county, through its officers, did unlawfully assess and levy the taxes on and against said allotted lands for the respective years therein set forth and in the amounts set out in each separate and distinct cause of action and the said officers of respondent county unlawfully and in violation of the rights of these petitioners demanded that they pay to said county the sums of money so levied and assessed against their respective allotments and that said County Treasurer threatened to sell and did advertise for

sale and did sell like Indian lands to recover such sums as taxes which had been levied and assessed against such allotments (record page 6). And it was further alleged that the amounts levied as taxes on the allotments created liens upon the lands and clouded the titles thereto; that said Choctaw and Chickasaw citizens, protested and objected to said assessing and taxing of their allotted lands and instituted actions in the state courts of Oklahoma to enjoin the respective counties from assessing and levying taxes on the allotted lands in question and all other lands allotted under said treaty and Act of Congress, and further enjoin and restrain the respective counties and their officers from enforcing and collecting said tax, from selling or threatening to sell, the lands of the Indian citizens for failure to pay the same and to further prevent said counties from clouding the title to their said lands by assessing and levying taxes thereon, the principal suits being *Choate et al.* v. *Trapp et al.*, *Alexander* v. *Rainey* and *English* v. *Richardson*, but the courts of Oklahoma refused to enjoin such counties and their officers from imposing and collecting such taxes, the said courts both trial courts and Supreme Court of Oklahoma holding and determining that said allotted lands were taxable and that the treaty exemption was no longer in force and effect (see 28 Oklahoma Reports 502-518-408 for Oklahoma Supreme Court decisions in said cases, record 7-8. These petitioners further plead the case of Gleason, a citizen of the Choctaw tribe of Indians, brought in his own behalf and in the behalf of all other Indian citizens against eleven counties in Oklahoma covering the greater part of the Choctaw and Chickasaw country the title of the cause being *Gleason* v. *Wood et al;* that the trial court and the Supreme Court of the State of Oklahoma denied the Indian citizens any relief in such action which was brought for the purpose of preventing the

counties and the officers thereof from levying and enforcing taxes on the lands allotted under and by virtue of the treaty hereinbefore referred to, the decision of the Supreme Court of Oklahoma is reported in Volume 28 of Oklahoma Reports page 502. These petitioners further set out that said actions were removed to the Supreme Court of the United States which court reversed the courts of Oklahoma, holding that all the allotted lands were exempt from taxation and that such exemption was a vested property right which could not be impaired, the said petitioners set out in such petition that said decision of this court was contained in Volume 224 of the United States Supreme Court Reports at page 679. And it was further alleged that the case of *Gleason* v. *Wood* after being determined in the Supreme Court of the United States was remanded to the trial court and that the said case came for the second time before the Supreme Court of the State being reported in Volume 43 Oklahoma Reports at page 9 (record page 9). It was further pleaded that the taxing officers of the various counties and the officers of Love County knew at the time of the assessing, levying, imposing and collecting of taxes on the allotted lands that said actions instituted for the purpose of preventing such taxation were still pending in the courts undetermined (record page 10). It is further set out in the petition that under the laws of Oklahoma taxes levied and not paid by the 1st of January following the time when taxes were due become delinquent and a penalty of 18 percent a year is added to the tax and enforced and collected by a sale of the property upon which the tax has been levied; but the officers of Love County threatened these petitioners that if the taxes were not paid which had been levied on their allotments they would enforce the said taxing laws against the lands and sell the same at

tax sale; that the officers of Love County contended, urged and held out that the lands of the claimants were not exempt from taxes and that the laws which had heretofore rendered them non-taxable had been changed and repealed and that these petitioners fearing that such contention of the officers of said Love County were true but refusing to believe that the same was true, paid the taxes levied and at the time of payment objected thereto and protested to the County Treasurer; that while the petitioners believed and contended that their lands were exempt from taxation under their treaty with the United States, but fearing that the contentions of said Love County and its officers might be true, and for the purpose of preventing the heavy penalty provided under the laws of Oklahoma from being imposed for non-payment of taxes, and to prevent the allotted lands from being sold for non-payment of taxes, and in order to protect themselves against great loss and damage in the event the actions then pending to prevent the taxation of their said lands were decided against them, did against their wills pay the amounts levied as taxes to the Treasurer of Love County, and at the time of such payment the county officers of Love County knew full well that each of said Indian citizens, these petitioners, were protesting and objecting to the assessment and taxation of their lands with all the force and power possessed by them, they carrying their protests and complaints to the highest court of the nation; that such money was forced from these petitioners by duress and threats and that they paid the same because of fear that their allotments would be sold for taxes and they would lose them altogether (record page 10-11).

These petitioners further alleged that the sums of money so paid and set out in their petition had not been repaid to

them and that in law, equity and good conscience Love County had no right to retain said money (record 12-14).

The entire petition containing the various causes of action and the affidavits supporting each cause of action are set out in the record pages 4 to 201 inclusive, each cause of action sets out the roll number of the allottee, the description of his land and the amount of taxes paid by each respective petitioner with the date of payment thereof.

It is to be noted that in the entire petition no reference is made as to any part of the taxes assessed, levied and paid on these allotments belonging to any other subdivision of Oklahoma than the respondent, Love County. In each instance the allegation is made that Love County levied the taxes and that Love County received the taxes and that Love County retained the taxes. Counsel are calling attention to this fact at this time for the reason that in the first paragraph of the syllabus of the opinion in this cause by the Supreme Court of Oklahoma and in the opinion itself, it is inferred that a part of the taxes levied and collected belong to school districts, townships or other subdivisions. The demurrer of the respondent, Love County, in the trial court admitting all the allegations of the petitioners to be true it cannot be said by the Supreme Court of Oklahoma that any part of these taxes were for the use and benefit of any other than the respondent, Love County.

The sum and substance of the facts in this case briefly stated are that after the Indian citizen had taken their allotments and received a patent therefor which patent recited that the land would be non-taxable as long as the title remained in the allottee not to exceed twenty-one years, which is the language contained in the treaty, Congress passed the Act of May 27, 1908, contained in 35 Stat. at L. 312, entitled,

"An Act for the removal of restrictions from a part of the lands of the allottees of the Five Civilized Tribes, and for the purposes," and the counties in Oklahoma which contain allotted lands, including Love County, determined that the force and effect of the tax exemption in the treaty and Act of Congress of June 28, 1898, 30 Stat. at L. 495-507, was no longer in force and effect, and that the allotted lands were taxable the same as all other property in the state of Oklahoma. When the alotted lands were taxed quite a number of different suits were brought against the various counties wherein allotted lands were situated to prevent by injunction the taxation of such allotments. In one of the cases several thousand Indians joined by name as plaintiffs, while other cases were brought by one or more Indian citizens in their own behalf and on behalf of all other Indian citizens similarly situated. In the trial courts in Oklahoma the Indians were denied any relief whatsoever and the various counties including Love County continued to tax the allotments and enforce the same under the tax laws of Oklahoma. The cases were appealed to the Supreme Court of the state and that court affirmed the trial courts in each case, holding that the treaty exemption from taxation was no longer in force or effect and that the allotments were taxable equally with all other property in the state. These cases were then removed to the National Supreme Court, which decided in May, 1912, that the allotted lands were not taxable and that the exemptions contained in the treaty and Act of Congress of June 28, 1898, were vested rights which could not be abrogated, even by Congress, and that the Act of Congress of May 27, 1908, 35 Stat. at L. 312, insofar as it attempted to make the allotted lands taxable, was invalid. The taxes imposed upon the allotted lands were so imposed under this invalid Act of Con-

gress which the courts of Oklahoma determined was valid. While these various suits were pending the counties, including Love County, continued to tax the lands and enforce the same, the Indian citizens protesting against the payment of these taxes, paid them through fear of great loss in the event their suits which were yet undetermined should be decided against them. The cases referred to which were instituted by the Indians were *Choate et al.* v. *Trapp et al.*, reported in 224 U. S. 665, and three companion cases determined at the same term of court in 1912. No taxes were levied against the allotted lands after the decision of this court in 1912 and after such decision the Indian citizens sought to have the counties return to them the money which had been so wrongfully extorted and coerced from them as taxes on their non-taxable lands. The Indians have been met with the defense that they paid such money voluntarily, of their own free will, without any undue influence being exerted upon them, and that they cannot now recover it back.

These petitioners from the beginning and throughout all the progress of this cause urged that their right to recovery of the money was by virtue of the tax exemption contained in the treaty and Act of Congress of June 28, 1898, being a vested property right which, when invaded and destroyed for and during the years the taxes were imposed and collected, the courts would compel compensation and restitution.

This vested right springing from a treaty and an Act of Congress being protected by Section 10, Article 1 of the Federal Constitution and the 5th and 14th amendments, will be protected and enforced by the National Supreme Court when ignored and avoided by the courts of the state.

The remedy for a wrong being an inseparable part of the law declaring a right, the denial by the state court of all

remedy for the invasion and destruction of a vested property right is a denial of the right itself by the state court.

In the petition for rehearing filed in the Oklahoma Supreme Court and set out on pages 218-233 of the record, it was urged that the State Supreme Court had overlooked that the money was in contravention of the rights secured under the to the plan and policy of the Federal Government in dealing with the Indians and their lands; that the exaction of the money was in contravention of the rights secured under the treaty between the United States and the Indians contained in the Act of Congress of June 28, 1898, 30 Stat. at L. 495; that the question presented in the cause is of Federal cognizance and must be determined in accordance with the Federal law and the construction of the Federal courts; that money paid under conditions like those in this case have been determined by the National Supreme Court to have been made under duress and coercion; that the judgment of the Oklahoma Supreme Court denies the vested rights of the petitioners which are protected by Section 10, Article 1 of the Federal Constitution, and the 5th amendment thereto, which rights were adjudged favorably to them in *Choate et al.* v. *Trapp et al.*, 224 U. S. 665, and companion cases, and that the protection extends to the remedy petitioners invoked for the violation thereof; that these petitioners by such judgment are deprived of their property without due process of law in violation of the 14th amendment to the Federal Constitution (Record 220-221).

In such petition for rehearing petitioners cited numerous decisions of this court and other courts which sustain their position, but the state court again ignored and denied the vested rights of these petitioners which existed under their treaty and the Act of Congress of June 28, 1898.

These petitioners urged in the court below and are still urging that the denial of recovery in this action denies to them the enjoyment of their vested rights under their treaty by invoking a state rule of public policy, and that the judgment of the state court operates to impair and destroy such property rights which were secured under their treaty with the Federal Government.

Petitioners in their brief heretofore filed on the motion to dismiss, presented their theory of the contract cause of the Federal Constitution as applicable to the matters now in issue and respectfully urge the court to refer thereo, the same being on pages 6-9 of such brief. "The equal protection" and "the due process" clauses of the Constitution are applied to the matters now before us on pages 10-13 of such brief, and on page 12 thereof we quote from *Bronson* v. *Kinie et al.,* 1 How. 311, with relation to the denial of a remedy for a wrong, as follows:

> "The remedial part of the law is so necessary a consequence (of the former two), that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

We direct the court's attention to Section 5260, Revised Laws of Oklahoma, 1910, which is set out in full on page 14 of our brief on the action to dismiss, for the purpose of making it clear that the only questions of law determined by the Oklahoma Supreme Court are those contained in the syllabus of the decision.

All these things were succinctly stated in our petition for the writ of *certiorari.*

SPECIFICATIONS OF ERROR.

I.

It was error for the Oklahoma Supreme Court to hold that no recovery could be had in this action because the respondent, Love County, may have paid out part of the tax money collected from petitioners to various subdivisions of the county, in the absence of a state statute authorizing it.

II.

The court erred in holding that the money paid respondent county as taxes upon allotted lands which were non-taxable under treaty with the United States and Act of Congress (June 28, 1898, 30 Stat. at L. 495), was paid voluntarily, and that in the absence of a state statute so authorizing cannot be recovered back.

III.

The Oklahoma Supreme Court further erred in denying a recovery in this action since such judgment operates to deny the protection of the Federal exemption from taxation secured under treaty contract with the Federal Government and protected by the Federal Constitution, Section 10 of Article 1.

IV.

The judgment of the Oklahoma Supreme Court is error for the reason that it denies relief for the violation and destruction of a vested property right and leaves petitioners without any remedy whatsoever therefor. The right which is thus destroyed existing by virtue of a treaty with the United States and an Act of Congress, and such judgment of the state court not only overrides "the due process clause," but also denies operation of "the equal protection clause" of the Federal Constitution, violative of the 5th and 14th amendment thereof.

ARGUMENT.

The decision of the Oklahoma Supreme Court in this cause is on the theory that the right of recovery rests upon the construction of the tax laws of the State of Oklahoma. It advances as a theory for denying the petitioners a recovery, that the payments were voluntary and therefore not recoverable; and the further theory that because the moneys collected from petitioners by Love County may have been distributed to the various subdivisions of the county.

The often repeated position of petitioners is that the Act of Congress, June 28, 1898, 30 Stat. at L. 495-507, under which these petitioners were allotted the non-taxable lands in Love County created in them vested property rights, or what might be termed a vested estate, and Congress having legislated in the matter the rights of these petitioners rests purely upon the Federal grant and no proceeding for the collection of the tax imposed by Love County can divest them either of their vested right or their remedy for its invasion or destruction, and therefore the determination of such rights depend upon a question of Federal cognizance only. Since Congress has legislated in the matter the entire subject is removed from the realm of operation of the laws of Oklahoma and the state laws on questions of public policy with reference to this proceeding cannot be invoked by the respondent, Love County, either to deprive them of their property or to deprive them of a remedy for the violation of such rights.

Since the decision of the Oklahoma Supreme Court is based solely upon state questions and avoids all questions of Federal aspect, counsel for petitioners in presenting this matter desire to discuss for a time the essential aspects of the decision of the state court. The syllabus sets out, declares

and is the law upon which the judgment rests, the first paragraph reading as follows:

> "In the absence of a state statute imposing liability therefor a county is not liable for taxes wrongfully collected by a County Treasurer and by him paid over to the state or municipal subdivision of the state other than the county against which liability is sought to be imposed."

We have heretofore referred to the fact that this statement cannot be based upon the facts in this cause, for the reason that all the money paid as taxes was levied by, paid to and retained by the respondent, Love County, under the allegations of the petition in the first instance, and such allegations have been admitted as true by respondent county in the trial court, but, however, we will discuss the relation of the legal principles set out in such syllabus to the law which controls this action.

FIRST SPECIFICATION OF ERROR.

The first assignment of error by counsel for petitioners in contradiction to the above statement of law as announced by the court below is as follows:

It was error for the Oklahoma Supreme Court to hold that no recovery could be had in this action because the respondent, Love County, may have paid out part of the tax money collected from petitioners to various subdivisions of the county, in the absence of a state statute authorizing it.

To state our proposition another way, it may be said that:

There were pending at the time of collection of the sums paid by petitioners to Love County, suits to enjoin the collection of the purported tax, which suits were sufficient notice to the county of the tax payers' claim to the money; and it is therefore error for the Supreme Court of Oklahoma to hold that the refund here demanded cannot be had because the county has distributed the tax money to the various municipal subdivisions of the county.

It is obvious that the Treasurer of Love County, Oklahoma, if he did distribute the money paid him by these claimants as taxes, had full knowledge at all times that these claimants were contesting the right of Love County, not only to tax their lands, but to receive or retain or distribute such money and such money is the subject matter of this cause. Since the County Treasurer had notice of this fact, the distribution, if any was made, by the county of the money cannot disturb the right of these petitioners to a recovery.

This seems elementary. In *Du Bois* v. *Board of Commissioners*, 10th Ind. App. 347, 37 N. E. 1057, it was held:

> "It is no defense to an action against a county for state, county and town taxes collected erroneously by the county treasurer, that after commencement of the action, a part of the tax collected for the state, and the town has been paid them out of the county treasury since the pending of the action is sufficient notice of the tax payers right to the money."

To the same effect, see *Greenabaum* v. *King*, 4 Kans. 332, 96 American Decision 172.

In the Du Bois case it was said:

> "As long as it (the money) remains in the county treasury, it was held in trust by the county, either for the appellant or for the proper funds to which it respectively belonged. When the board of commissioners received notice of the appellant's claim the county becomes a trustee for the appellant, and in the event it was afterwards adjudged that his claim was a meritorious one, it became obligatory upon the county to refund the money to appellant which had been paid by him."

See also:

Shoemaker v. *Bond*, 36 Ind. 175.

The tax money paid in this case by petitioners was received by Love County in absolute violation of the provisions of the Choctaw-Chickasaw Treaty, Act of Congress, June 28th, 1898, 30 Statute 495-507. By the terms of the treaty it is provided that lands allotted to petitioners were and are non-taxable while the title to same remains in the original allottee, not to exceed 21 years from date of patent, and in the case of *Choate* v. *Trapp*, 224 U. S. 665, and companion cases, this Court held the treaty exemption to be a vested right and that if a consideration was necessary to support the treaty that consideration existed by virtue of the agreement of the Federal Government to hold such lands non-taxable for the period designated, in consideration of which these Indians took their lands in severalty by allotment, as citizens of the Choctaw-Chickasaw Nation. It is, therefore, evident that the money which passed into the possession of the county in this instance was without authority of law, especially since in the *Chotae* v. *Trapp* case this court held the land to be non-taxable. The recipient of the money, Love County, was in the position of one who has the property of another in his possession unlawfully, and was not entitled to enjoy the beneficial interests in the same, nor was such county entitled to distribute the same to any subdivisions which it might represent as a taxing agency.

In the case of the *United States Exp. Co.* v. *Allen*, 29 Fed. 712-14, the court said:

> "If * * * the tax is unconstitutional, it is void; it confers no right, imposes no duty, supports no obligation. Nothing can be predicated upon it."

If the right to tax did not exist, the right to distribute the fund did not exist. The county was a trustee of these petitioners, by its own wrongful act, and since it and every agency

connected with the operation of the taxing machinery knew that a long series of injunction suits were pending at the times the payments were made, to test the validity of their action, it seems equitable that it cannot now plead its own wrongful acts, nor repudiate its obligation, which result will follow the judgment of the Supreme Court of Oklahoma if it is permitted to stand.

Hill on Trustees (144), lays down the following rule:

> "Whenever the circumstances of a transaction are such that the person who takes the legal estate in property, cannot also enjoy the beneficial interests without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment."

This language was adopted by the Supreme Court of the United States in the case of *Chapman* v. *Douglas County Commissioners,* reported in 17 Otto., 107 U. S. 348-361. The Chapman case was one wherein Douglas County, Nebraska, had received certain land under agreement made by the county commissioners in excess of their authority, agreeing to pay for it at a definite time, the grantor on default of payment to be entitled to a decree that the county surrender possession and reconvey to him, unless payment be made of the amount due therefor, within the designated time. The contract was *ultra vires.* However, since the land had been conveyed to the county in pursuance of the agreement and no consideration had been paid by the county, or was ever paid, this Court held the county as a trustee of the title and decreed in that case a reconveyance of the property, thus applying the rule of trusteeship to a municipality in fur-

therance of the declared principle of the law, which it enunciated as follows:

> "The obligation to do justice rests upon all persons, natural or artificial; and if a county obtains money or property of others without authority, the law, independent of any statute, will compel the restitution or compensation."

The same rule is announced in *Marsh* v. *Fulton County*, 10 Wallace 676-684, 77 U. S. 1040-1042; *Louisiana* v. *Wood*, 102 U. S. 294-299; *Miltonberger* v. *Cook*, 18 Wallace 421-485, 85 U. S. 864. The same line of holdings is announced by Mr. Justice Field, prior to the time that he occupied the bench of the National Supreme Court, and at a time when he was one of the Justices of the Supreme Court of California, in what are familiarly known as the "Slip Cases" (*McCracken* v. *City of San Francisco*. 16 Cal., p. 591). See, also, *Clark* v. *Saline County*, 9 Neb. 516; *Pimental* v. *San Francisco*, 21 Cal. 262; *Argenti* v. *San Francisco*, 16 Cal. 282.

SECOND SPECIFICATION OF ERROR.

The second paragraph of the syllabus by the court below enunciates the second proposition of law upon which the judgment rests, and is as follows:

> "Where certain citizens of the Choctaw and Chickasaw Nations paid certain taxes assessed against their respective allotments, which were non-taxable, in order to avoid a threatened sale of their lands and in order to avoid the imposition of penalties thereon for failure to pay said taxes and where at the time of said payment there was pending litigation seeking to enjoin collection of said taxes, and where at the time said parties were fully informed as to the law which made said taxes illegal, and there was no immediate necessity for the payment of said taxes to prevent a seizure of the person or property of said persons. *Held*: That said payment

was voluntary, and in the absence of statutory authority therefor cannot be recovered back."

In discussing this conclusion of law of the Supreme Court of Oklahoma, counsel for petitioners advance the second assignment of error as follows:

The court erred in holding that the money paid respondent county as taxes upon allotted lands which were non-taxable under treaty with the United States and Act of Congress, June 28, 1898 (30 Stat. at L. 495), was paid voluntarily, and that in the absence of a state statute so authorizing cannot be recovered back.

Under this division of our discussion it must appear that the Supreme Court of Oklahoma erred in holding in this case that the petitioners who are citizens of the Choctaw and Chickasaw tribes of Indians and were allotted lands as such in Love County, Oklahoma, under the provisions of a treaty contained in Act of Congress, June 28, 1898, and who without question paid, under duress, compulsion and protest, money to Love County as purported taxes upon their respective allotments, which assessment and levy of tax was and is in violation of the vested property rights of the petitioners under such treaty, and who seek by this action to recover from such county the money so paid by them to it, are not entitled to recover the same, because the court below, in carrying out a state policy, declares the payments were voluntarily made and are not recoverable in the absence of a state statute permitting such recovery.

In the case of *Choate et al.* v. *Trapp et al.*, 224 U. S. 665-676, this court had before it the provisions of the Choctaw-Chickasaw Treaty, which has been heretofore referred to in this brief with reference to the tax exemption claims of the Indians of the Choctaw-Chickasaw Tribes, which includes the petitioners in this case within its category. In

that case the exemption under the treaty was sustained, and the injunction prayed for by the respective citizens of the tribes was sustained, and the respondent county and other counties were enjoined from taxing the lands of your petitioners. This present action was brought to recover the money paid as taxes by petitioners prior to the final determination of the injunction suit by this court.

The decision of the Supreme Court of Oklahoma proceeds upon the theory that the right of recovery is a state question, and the theory of the petitioners is, that since their right is based on the treaty and Act of Congress, their remedy lies in redress under such treaty and Act of Congress and is, therefore, a question of Federal cognizance; that since Congress has legislated on this subject and since, in the case referred to, the right vested in them by the treaty has been determined to be a Federal right, it is immaterial whether duress was exercised upon these Indians within its ordinary technical definition. The question is, whether their rights have been impaired and if so, whether there is a remedy. Regardless of the Federal right, however, counsel desire to discuss at this time the theory itself, on which the State decision is based, and it is earnestly contended that not only are the elements of coercion and duress present in this case, which renders the tax recoverable on that theory, but that since the entire tax proceeding is void, the rule of voluntary payment has no place and no application to the proper determination of the case.

In the case of *United States* v. *Chehalis County*, 217 Fed. 285, it was said in substance that, the rule that taxes voluntarily paid cannot be recovered back, is made for the benefit of the state, and has no application to a suit by the United States to recover taxes wrongfully collected on lands

of Indian allottees, which the government has assumed the duty of holding in trust and protecting from taxes. The court said in the opinion in that case:

> "The exacting requirements necessary to take a given case out of the rule as to voluntary payments, grows in part out of the policy of protecting the state from embarrassment in the matter of collecting its revenue."

In the case of *Cox* v. *Lott*, also cited as "State Tonnage Tax Cases," 12 Wallace 204-220, discussing the question as to the character of a void tax, the Supreme Court of the United States said:

> "Where the party assessed voluntarily pays the tax he is without remedy in such an action (an action to refund), but if the tax is illegal or was erroneously assessed and he paid it by compulsion of law or under protest or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other condition to the exercise of the right to institute such a suit."

In the suit of *Harold* v. *Kahn*, 159 Fed. 608-614, discussing the assignment of plaintiff in error, that the payment of the tax therein assessed, was not involuntary, the court said:

> "In support of the first contention counsel for plaintiff in error cites numerous decisions of the Supreme Court, from which the proposition is sought to be induced that in addition to the protest there must be disclosed something like actual duress under which the payments sought to be refunded is made, as where duties are paid in order to obtain possession of goods held in the custody of a collector of customs. Undoubtedly in such cases, and especially where goods are perishable, the owner or claimant is compelled to pay the duties in

order to obtain possession of his property and avoid the loss incident to its detention. But these are not the only cases in which payments under protest will support an action for the refunding of money paid. Every demand by one clothed with official, legal authority to make the demand, imposes a certain compulsion on the one upon whom the demand is made. Such a demand is always exigent and places the recusant in a position of disadvantage. Especially is this so in regard to the payment of taxes, state or national. The proper administration of the fiscal affairs of the government require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid, and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that encourages the payment under protest, of disputed taxes. Though there is some conflict in the *dicta* of the Supreme Court, we think that the true doctrine is that the taxes are paid under protest; that they are being illegally exacted or with notice that the payor contends they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for such a suit has been established."

Discussing the question as to whether taxes paid under duress and protest, levied under a tax law which is unconstitutional, Mr. Justice Holmes, in the case of the *Atchison, T, & S. F. Ry. Co.* v. *O'Conner*, 223 U. S. 280-287, said:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left, of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter cases he can interpose his objections by way of defense; but where, as is common, the state has a more summary

remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, the courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case his constitutional rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms. * * * In any event, the penalty would go on accruing during all the time that might be spent before the validity of the defense could be adjudged. As appears from the decision below, the plaintiff could have no certainty of ultimate success, and we are of the opinion that it was not called upon to take the risk of having its contracts destroyed and its business injured, and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of the opinion that the payment was made under duress."

The opinion in the O'Conner case is followed by the case of *Union Pacific R. R. Company* v. *Public Service Commission*, decided December, 1918, 248 U. S., page 67, wherein Mr. Justice Holmes, speaking for the court, said:

"On the facts we can have no doubt that the application for a certificate and the acceptance of it were under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the

lesser of two evils. But the fact that the choice was made according to interest, does not exclude duress. It is a characteristic of duress so-called. * * * The railroad company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law."

So, in this case, these claimants, while prosecuting all available remedies for the protection of their rights, should not be required to take the risk of a final determination of impending suits for the enjoining of the taxes upon their lands, and run the risk of losing their property by a final determination against them, which would result in the sale of their allotments under the tax laws of Oklahoma, and would result in the piling up of penalties at the rate of eighteen per cent per annum in addition to the original tax, had the final determination of *Choate* v. *Trapp, supra,* and companion cases been adverse to their claim of exemption under the treaty.

In *Patton* v. *Brady,* 184 U. S. 608-614, the court said:

"Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

In the case of *Robertson* v. *Frank Bros.,* 132 U. S., pp. 17-27, the court said as follows:

"This point was discussed in *Maxwell* v. *Griswold,* 51

U. S. —, 10 How. 242, 256, and in *Swift Co.* v. *U. S.*, 111 U. S. 22-28. In *Maxwell* v. *Griswold* an appraisement was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The government contended that this was voluntary. But the court said:

" 'This addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases, that to make a payment involuntary it should be by actual violence or physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment. All these requisites existed here. We have already decided that the demand for such an increased appraisal was illegal. The appraisement itself as made was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector *colore officii* through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period. * * * The money was thus obtained by a moral duress not justified by law, and which was not submitted to by the importer except to regain possession of his property, withheld from him on grounds manifestly wrong. Indeed, it seems sufficient to sustain the action whether under the Act of February 26, 1845 (U. S. Rev. Stat. 3011), or under principles of the common

law, if the duties exacted were not legal, and were demanded and were paid under protest.' "

It was further said in such opinion:

"When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an official exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each."

See, also:

Swift v. *United States*, 111 U. S. 22-28.
Maxwell v. *Griswold*, 10 How. 242-258.

Examination of authorities on this subject by counsel for petitioners induces them to believe that coercion and duress may be defined as a state of mind induced by threats or some actual or threatened exercise of power possessed or supposed to exist or be possessed, or an apparent capacity to enforce such threats or power, sufficient to overcome the volition and free action of the one against whom it is used. This definition is sustained by the several authorities collected in 11 Corpus Juris 945-946.

Coercion and duress are frequently used to convey the same meaning, although most authorities make a distinction by stating that duress consists in actual or threatened physical violence in order to overcome the will of the person.

Most of the cases heretofore cited under this subdivision did not deal with duress and coercion when applied to real

property, but counsel for petitioners assert that there can be no distinction. In a case in the Supreme Court of Minnesota, *Joannin et al.* v. *O'Gilvie et al.*, 49 N. W. 564, it is said:

> "It has been sometime said that there can be no such thing as duress with respect to real property, so as to render the payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, was the payment voluntary? And for the purpose of determining that question, there is no difference whether the duress be of goods and chattels or of real property or of person," citing authorities.

The Supreme Court of Kansas, in *Ottawa University* v. *Board of Commissioners of Franklin County*, 116 Pac. 892, in discussing a case involving the recovery of money paid as taxes upon exempt lands, but in which no Federal treaty or Act of Congress is involved, said:

> "There is no difference of rule in respect to involuntary payments of taxes upon real and personal property. The question in each instance is, whether the will of the tax-payer was constrained."

This court in *United States* v. *Huckabee*, 16 Wall. 414, in discussing coercion and duress, said:

> "Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford

him anything like a suffficient and adequate compensation for the injury."

In this case the recipient of the coercive measures and acts are Indian citizens. The defense of voluntary payment attempted to be enforced against them in this case is a harsh rule of forfeiture, and in the administration of the affairs of Indians the courts of the United States have, from the beginning, declined to apply ordinary rules of forfeiture against them, but on the contrary, have exercised a liberal construction at all times in determining their rights based upon the fact that the Indians belong to a class of people who are not well informed of their rights and therefore the necessity of liberal construction in determining all questions touching their persons and property. The Indian citizen is not on an equal footing with the county and its officers, and such inequality must be made good by superior justice. This court in *Choctaw Nation* v. *United States,* 119 U. S. 1-28, referred to the unequal positions of the Indian citizens and other persons and the government, and further this court in *Tiger* v. *Western Development Company,* 221 U. S. 286, refers to the Indian citizens as members of an inferior and dependent race, while in *Choate et al.* v. *Trapp et. al., supra,* this court said that in the government's dealings with the Indians the construction to be placed upon things in controversy, instead of being strict, is to be liberal, and doubtful questions are to be resolved in favor of a weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith. And the court further said that this rule of construction has been recognized without exception for more than 100 years and has applied in tax cases.

This rule of liberality seems of such antiquity, and so

thoroughly established that counsel believes that further authority is unnecessary to recognition of the principles, and feel that its application in this case is alone sufficient to overcome the attempted acts of the respondent, Love County, to deprive these petitioners of their vested property rights.

THIRD SPECIFICATION OF ERROR.

The Oklahoma Supreme Court further erred in denying a recovery in this action since such judgment operates to deny the protection of the Federal exemption of tax secured under treaty contract with the Federal Government and protected by the Federal Constitution, Section 10, Article 1.

The treaty of the Choctaw and Chickasaw Indians, which is contained in Act of Congress of June 28, 1898, 30 Stat. at L. 495-507, providing that the lands of the Indians, including these petitioners, would be non-taxable while the title thereto remained in the original allottee, not exceeding twenty-one years from the date of patent, was and is a contract protected by the provisions of Section 10, Article 1 of the Constitution of the United States, which section provides that no state shall make a law impairing the obligations of contracts.

The judgment of the Supreme Court of Oklahoma denying the claims of the petitioners is contrary to such Constitutional provision and is error, since it operates to deny them the protection of the Federal exemption as a contract as well as a Federal grant, by giving force to the taxing laws of the State of Oklahoma which were extended by the Constitution of the state in 1907, the advent of statehood, over the territory in which the allotments of these petitioners were situated, such extension of the state law being subsequent to the time when petitioners were allotted their lands in severalty.

The courts of Oklahoma now propose to justify the retention by Love County of the money on the ground that un-

der the tax laws of Oklahoma the payments were voluntarily made, which is simply enforcing a rule of state public policy against the Indians which results in abrogating and destroying the benefits of a Federal grant and impairing the treaty contract between the United States and such Indians.

In the case of *Choate* v. *Trapp*, 224 U. S. 665-679, discussing the identical question of tax exemption rights vested by the Choctaw and Chickasaw Treaty in the citizens of the tribes, this court says, after discussing the character of the property rights of the Indian citizens under the treaty:

> "The question in this case, therefore, is not whether the plaintiffs are parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act, which are now protected by the Constitution of the United States. * * * And though it (the Curtis Act) provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim on the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that, 'all land allotted shall be non-taxable,' stipulated further that each enrolled member of the Tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted the patent should be held thereby to assent to the terms of the agreement, and to relinquish all his rights in the property formerly held in common.
>
> "There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claims to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption."

The operation of the theory of voluntary payment, which is the only defense in this case, can result in no other conse-

quence if permitted as a defense as a refund to the money paid as taxes, than to destroy the treaty exemption for and during the years the money was exacted and paid. As we had before stated, this rule is one of forfeiture and based purely upon a rule of state public policy and is in direct opposition to the Federal laws applied to Indian citizens and their property. Heretofore we have said that the rights of the Indian citizens must not be strictly construed and that no rule of forfeiture should be invoked against them.

At the conclusion of the discussion under the second assignment we referred to the holding of this court in *Choate et al.* v. *Trapp et al.*, relative to the liberality of construction in matters relating to the Indian citizens, their property and their contracts.

In relation to the contract character of the tax exemption in favor of these petitioners, Mr. Justice Lamar, who wrote the opinion of this court in *Choate et al.* v. *Trapp et al.*, cited *New Jersey* v. *Wilson*, 7 Cranch. 164, as being directly in point, and we quote the following excerpt from the New Jersey case, which was adopted by the Justice in the opinion, as follows:

> "This court, speaking by Chief Justice Marshall, holds that 'every requisite to the formation of a contract is found in the proceedings between the then Colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, which was a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians executed their deed

of cession. This is certainly a contract clothed in forms of unusual solemnity. * * *'"

Mr. Justice Lamar, continuing, stated further:

"The case here is much stronger. For the exemption, which adds value to the property, is not perpetual, but is attached to the land only so long as the Indian retains the title, and in no event to exceed twenty-one years. It is property, and entitled to protection as such, unless the fact that the owner is an Indian, subject to restrictions as to alienation, made a difference."

We, therefore, assert in all confidence that the contractual character of the tax exemption to the Indian citizens, is established in this case beyond all controversy.

The Supreme Court of Oklahoma repudiates this Federal contract, which, by its own Constitution, it was bound to protect and enforce. The treaty in question cannot be, and is not, a "mere scrap of paper."

After Oklahoma was admitted to the Union as a state the laws of the state were extended over the persons and the property of these petitioners and the tax laws of the state were in fact put into effect and enforced as to their lands, which, under the treaty contract, were exempt from taxation. The exempt lands being brought under the operation of the state tax laws subsequent to accepting their lands by allotment in severalty is in effect the same as a passage of a state statute imposing taxes upon such lands, which, if it is permitted to operate, as it has in effect in this case, to tax their lands, and then to destroy their remedy for the wrongful taxation of such lands, as the final judgment of the state Supreme Court does in this case, then we have a clear violation of Section 10, Article 1 of the Federal Constitution, pro-

viding in effect that no state shall make any law impairing the obligation of a contract.

We have heretofore referred to the fact that to deny a remedy is in effect a denial of the right, but at this time we desire to quote further from the opinion of this court in the case of *Bronson* v. *Kinzie et al.*, 1 How. 311, as follows:

> "But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impractical to pursue it. Blackstone in his Commentaries on the Laws of England (1 Vol. 55), after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: 'The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said 'that the field or inheritance which belonged, Titius' father is vested by his death in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gains restore the possession to Titius and also pay him damages for the invasion.'

"We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result."

See, also:

White v. *Hart*, 13 Wallace 646-654.
Green v. *Biddle*, 5 Peters 369.
Von Hoffman v. *Quincey*, 4 Wallace 552.
Ogden v. *Saunders*. 12 Wheaton 231.
Fletcher v. *Peck*, 6 Cranch 87.
Sturgis v. *Crownshield*, 4 Wheaton 122.
Beers v. *Haughton*, 9 Peters 359.
McCracken v. *Hayward*, 2 Howard 612.
Planters Bank v. *Sharp*, 6 Howard 327.

FOURTH SPECIFICATION OF ERROR.

The judgment of the Oklahoma Supreme Court is error for the reason that it denies relief for the violation and destruction of a vested property right and leaves petitioners without any remedy whatsoever therefor. The right which is thus destroyed existing by virtue of a treaty with the United States and an Act of Congress such judgment of the state court not only overrides "the due process clause," but also denies operation of "the equal protection clause" of the Federal Constitution, violative of the 5th and 14th amendments thereof.

The judgment of the court below is error, because it denies relief to petitioners for the violation of vested property rights. Its effect is to leave them without any remedy. The right which it destroys rests upon a treaty contract with the United States which is contained in the Act of Congress of June 28, 1898, 30 Stat. at L. 495-507.

The tax laws of the State of Oklahoma operated oppressively on petitioners to deprive them of their property, not only without express authority, which is essential to the power to tax, and without which there can be no tax, but the purported power to tax was exercised in absolute violation of superior law which created and protected the exemption.

Not only does it operate in violation of law, which is not "due process," but its effect is also to deny petitioners the "equal protection" of law, in violation of the 5th and 14th amendments to the Constitution of the United States.

We have heretofore quoted from *Bronson* v. *Kinzie* under the preceding specification of error, but ask the indulgence of the court in again quoting therefrom the following paragraph:

"The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no methods of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

The tax laws of Oklahoma as put in operation by respondent county and the Oklahoma courts were not only void, but were in violation of a Federal law. Notwithstanding the fact that under their purported operation these petitioners have been deprived of their property, they have been met at all times with the defense, that notwithstanding the illegality and the injustice of the acts on the part of the taxing authorities of Love County and the protests and the efforts to prevent the same, they only yielding to what they could not prevent, and in order to avert a greater disaster, the payments were voluntarily made and not recoverable.

In the case of *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20 to 41, at page 36 of the opinion, the court said:

> "The provisions of the 14th Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprive another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. *Chicago, B. & Q. R. Co.*, v. *Chicago*, 166 U. S. 226. Following the above case, the Federal courts, through the country, have frequently reviewed the action of taxing bodies, when, un-

der the facts, such action was in effect the action of the state, and, therefore, reviewable by the Federal courts by virtue of the provisions of the amendment in question. See *Nashville, C. & St. L. R. Co.* v. *Taylor,* 86 Fed. 168; *Louisville Trust Co.* v. *Stone,* 46 C. C. A. 299, 107 Fed. 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: 'It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional and illegal undervlauation of other property by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases, Federal jurisdiction will arise, because of the equal protection of the laws guaranteed by the 14th Amendment."

In the case of *Ex Parte Commonwealth of Virginia,* 10 Otto 339-370, 100 U. S. 339-370, this Court further said:

"The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States empowered Congress to enact. This extent of the powers of the General Government is overlooked, when it is said, as it has been in this case, that the Act of March 1, 1875, interferes with state rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not

reach to that extent. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been granted. Indeed, every addition of power to the General Government involves a corresponding diminution of the Governmental powers of the States. It is carved out of them.

"We have said the prohibitions of the 14th Amendment are addressed to the States. They are: 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State. This must be so, or the Constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annual or to evade it.

"But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation

must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured."

It was said in the case of *Scott* v. *McNeal,* 154 U. S. 34-51:

"The 14th article of amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Virginia* v. *Rives,* 100 U. S. 313, 318, 319; *Ex parte Virginia,* 100 U. S. 339, 346; *Neal* v. *Delaware,* 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in *U. S.* v. *Cruikshank,* 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank* v. *Okely,* 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' "

Finally, in the *Choate* v. *Trapp case,* 224 U. S. 655-679, this court, in considering the character of the exemption conferred and enjoyed by these identical people, Mr. Justice Lamar said as follows:

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment.

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted

must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute. The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

CONCLUSION.

In conclusion, counsel for petitioners desire to refer to their statements on the concluding pages (26-28) of their brief defending the jurisdiction of this court in this cause, which question is to be considered by the court at the time of consideration upon the merits.

We hope that our former brief on the motion to dismiss, defending the jurisdiction of this court, together with this brief, upon the merits of the controversy, will be of material aid to the court in arriving at a just and proper decision of the matter in controversy. This brief is probably in repetition, to a small extent, of our other brief prepared more than a month ago, but such repetition seems unavoidable.

Upon consideration of the authorities and the reasons advanced herein, as well as those contained in our former brief, we respectfully insist that the judgment of the Supreme Court of Oklahoma in this cause is erroneous and should be reversed and remanded with instructions to such Supreme Court that it vacate same and render judgment for these petitioners.

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